

SERVED: November 18, 1999

NTSB Order No. EA-4802

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 1999

CHRISTIAN J. CHANDLER,)	
)	
Applicant,)	
)	
v.)	Docket 265-EAJA-SE-14270
)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The applicant has appealed from the March 19, 1999 decision and order of Chief Administrative Law Judge William E. Fowler, Jr., that denied applicant's Equal Access to Justice Act (EAJA), 5 USC § 504 application for attorney's fees and expenses.¹ The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision. For the reasons discussed below, applicant's appeal is denied and the initial

¹A copy of the decision is attached.

decision is affirmed.

The underlying order in this case alleged violations of Sections 91.13(a), 91.303(d), and 91.9(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91. Applicant was alleged to have performed aerobatic maneuvers in a Beechcraft King Air aircraft after discharging parachutists, within four nautical miles of the center line of a Federal airway, and contrary to the operating limitations of that aircraft. The complaint arose out of the observation of applicant's maneuvers by an FAA inspector who happened to be at the airport while not on official duty. The inspector's observation of applicant's seemingly aggressive maneuvers, including bank angles exceeding 45 degrees, led him to believe that applicant's operation was not necessary for "normal" flight.

Applicant's defense before the law judge was premised largely on applicant's attack on the credibility of the inspector, and also on his legal argument that applicant's maneuvers were normal for parachute operations. While the law judge affirmed the Administrator's allegations, the Board found it was unable to uphold the charges because the FAA failed to provide an adequate evidentiary foundation as to what constitutes aerobatic flight. We dismissed the complaint in its entirety.

The EAJA requires the government to pay a prevailing party certain attorney fees and costs, unless the government establishes that its position was substantially justified. 5 U.S.C. § 504(a)(1). For the Administrator's position to be found

substantially justified, it must be reasonable in both fact and law. Pierce v. Underwood, 487 U.S. 552 (1988). The Administrator's failure to prevail on the merits, as in this case, is not determinative of an EAJA award. U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817 (1993). If the Administrator's legal theory was reasonable, if the facts alleged had a reasonable basis in truth, and if the facts alleged supported the legal theory, the Administrator may yet be found substantially justified. *Id.* at 2.

Applicant's argument in this appeal repeatedly makes the claim that the Board found the testimony of Inspector Fischer incredible. We did not. To the contrary, we found that the CDR² printout recorded by the automated radar terminal system tended to corroborate the inspector's testimony. The data certainly did not contradict his observations. In any event, our precedent makes it clear that the Administrator is substantially justified in proceeding to a hearing "when key factual issues hinge on witness credibility." Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994); Martin v. Administrator, NTSB Order No. EA-4280 at 8 (1994).

The question of whether the Administrator's legal theory was reasonable is a separate issue. The regulations at issue, FAR §§ 91.303 and 91.9, have been in existence, in one form or another, for many years, and we did not question the validity of either regulation in our decision below. See NTSB Order No. EA-4717 at

²Continuous Data Recording

9-10. See also Administrator v. Couch, NTSB Order No. EA-3655 (1992). Our difficulty with the Administrator's legal position had to do with her interpretation of these valid regulations in a manner that extended them to a particular type of flight operation for the first time. Our reason for declining to uphold the violations was not intended to foreclose the Administrator's ability to define regulations by adjudication, but to require the Administrator to satisfy her burden of proof by laying an adequate evidentiary foundation, so that we could properly judge applicant's conduct against some specific standard. That the Administrator failed to anticipate our questioning a credible application of her regulations to the facts before us does not mean her allegations were not justified, nor does it mean that her legal theory was unreasonable. See Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983)(the government may sustain its burden by showing its position is "a novel but credible extension or interpretation of the law."). The purposes of EAJA would not be served by an award of fees under these circumstances.

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's order denying the EAJA application is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.